PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARC ALEXANDER;
TIMOTHY CLARK;
GEORGE FRYE;
ROBERT A. MOORE;
ANGELA MOORE;
RICHARD SAXBERG;
JOSH DAVID REEDY,
Plaintiffs-Appellants,
v.
M.H. ESTEPP, individually and in his capacity as Fire Chief;
YVONNE TYLER, individually and in her official capacity;
PRINCE GEORGE'S COUNTY;
MAUREEN HENNESSY, individually and in her official capacity;
WILLIAM H. GODDARD, individually and in his official capacity,
Defendants-Appellees.

No. 95-2978

Appeal from the United States District Court
for the District of Maryland, at Greenbelt,
Alexander Williams, Jr., District Judge.
(CA-93-2636-AW, CA-94-2090-AW)

Argued: June 5, 1996

Decided: September 5, 1996

Before WILKINSON, Chief Judge, MICHAEL, Circuit Judge, and MACKENZIE, Senior United States District

Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Michael wrote the opinion, in which Chief Judge Wilkinson and Senior Judge MacKenzie joined.

COUNSEL

ARGUED: Daniel F. Goldstein, BROWN, GOLDSTEIN & LEVY, Baltimore, Maryland, for Appellants, Henry Robbins Lord, PIPER & MARBURY, L.L.P., Baltimore, Maryland, for Appellees. ON BRIEF: Joseph B. Espo, Lauren E. Willis, BROWN, GOLDSTEIN & LEVY, Baltimore, Maryland, for Appellants, Leonard E. Cohen, Ann L. Lamdin, PIPER & MARBURY, L.L.P., Baltimore, Maryland; Barbara L. Holtz, Acting County Attorney, Sean D. Wallace, Deputy County Attorney, PRINCE GEORGE'S COUNTY, MARYLAND OFFICE OF LAW, Upper Marlboro, Maryland, for Appellees.

OPINION

MICHAEL, Circuit Judge:

The plaintiffs are six white men and one white woman who sought employment as Prince George's County, Maryland, firefighters in 1993 and 1994. They sued fire department officials and the county under 42 U.S.C. §§ 1981 & 1983, alleging that the department's affirmative action program impermissibly discriminates on the basis of race and

sex, in violation of the Equal Protection Clause of the Fourteenth Amendment.[1] The District Court granted the defendants' motion for summary judgment and denied the plaintiffs' cross-motion for summary judgment.

We affirm in part the judgment of the district court, and we reverse in part. We hold that (1) the department's affirmative action program is invalid because it is not narrowly tailored to achieve its goals, (2) further proceedings are necessary to determine whether plaintiff Josh Reedy would have been hired but for the existence of the program, (3) the other plaintiffs were not denied employment because of their race or sex, and (4) the individual defendants have not established that they are entitled to qualified immunity.

I.

Prince George's County chooses its firefighters in the following manner. Applicants must take a pass/fail performance examination and a written examination. Those who pass both are interviewed. Each applicant is scored based on his or her performance on the written examination and in the interview. The department then groups the applicants into three "bands"—"Outstanding," "Well Qualified," or "Qualified"—based on their combined scores. Within each band, applicants are ranked based on their "preference level." A county ordinance requires that within the same

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[1] The individual defendants and their positions and roles are as follows: M.H. (Jim) Estepp is the county's fire chief. Maureen Hennessey was an officer in the fire department's Administrative Services Division of the Management Services Command and played a key role in hiring new recruits. William F. Goddard, III, was the lieutenant colonel in charge of the Management Services Command and also played a key role in hiring. Yvonne R. Tyler, a civilian employee of the fire department is the administrative assistant in charge of personnel and is the recruitment and examination board administrator.

band (Outstanding, Well Qualified, or Qualified), firefighter applicants are to be hired in the following order:

(1) Current county employees seeking promotions;

(2) Disabled military veterans;

(3) Non-disabled veterans who were volunteer firefighters;

(4) All other non-disabled veterans;

(5) All other former volunteer firefighters;

(6) Displaced homemakers not in any of the above categories;

(7) County residents not in any of the above categories;

(8) All other persons.

Prince George's County Code § 16-162(d)(2)(i). The preferences for volunteer firefighters ((3) & (5)), however, may be eliminated if the county's personnel officer certifies in writing to the fire chief that continued use of the preference "will have a disparate impact on a protected class as defined by the guidelines of the Equal Employment Opportunity Commission." Prince George's County Code § 16-162(d)(4). Applicants within the same band who have the same preference level are ranked on the basis of their combined examination and interview scores. The department maintains a list of the applicants and their total rank (based on band, preference, and score). This list is called the "Applicant Register," and it is continually updated as new applicants apply and existing applicants withdraw their applications.[2]

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[2] The district court correctly held that the Applicant Register was not inadmissable hearsay. The Applicant Register "set [ ] forth [ ] the activities of" the fire department, namely, the ranking of applicants for employment. Fed. R. Evid. 803(8)(A).

The mechanics of the department's affirmative action program have never been committed to writing, but the record indicates that the program works in the following manner. Each recruiting season fire department officials set informal caps on the number of whites and the number of males who will be offered employment.[3] The department offers applicants employment in the order in which they are listed on the Applicant Register, but once a cap is reached (either for whites or for males), a lower ranking, uncapped applicant is offered employment instead of a higher ranking, capped applicant.

The informal caps are imposed in an effort to meet affirmative action goals set (in percentages) by the county. In the past the county's goals have tracked Census data. In 1993 and 1994 the county set goals of having 18 percent of its workers female and 39 percent non-white or Hispanic. Currently, 16 percent of county protective services personnel (firefighters and paramedics) are female and 38 percent are non-white or Hispanic. County officials have said that they expect to increase the affirmative action percentage goals in order to track new Census data expected to show increases in the county's minority population and in the percentage of female participation in the workforce.

The plaintiffs complain specifically about the 1993 and 1994 hiring seasons. In 1993 the department offered employment to thirteen applicants. According to the Applicant Register, none of the plaintiffs ranked better than fourteenth in that hiring season. In 1994 the department offered employment to nine applicants. Plaintiffs Marc Alexander and

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[3] The parties dispute what these "caps" should be called. The plaintiffs have described them as quotas; the defendants call them flexible goals. We believe the term "informal caps" is the most appropriate description.

Angela Moore received and accepted offers.[4] Five other applicants accepted offers of employment. Plaintiff Josh Reedy ranked eighth on the Applicant Register, but the department did not offer him a job. The remaining plaintiffs ranked lower than ninth.

The plaintiffs sued seeking injunctive, declaratory, and monetary relief. The district court rejected all of their claims and entered summary judgment in favor of the defendants.[5]

II.

We believe that the department's affirmative action program, as it is currently structured, cannot pass constitutional scrutiny, even though "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand,* 115 S. Ct. at 2117.

All racial classifications—even those intended to benefit minority groups—are subject to strict scrutiny. *Id.* at 2111 (racial classifications are "inherently suspect" and receive "a

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[4] Moore received an offer because of the existence of the affirmative action program.

[5] The district court held as a preliminary matter that all the plaintiffs had standing, including those who would not have been hired even in the absence of the department's affirmative action program. We affirm this ruling. "The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.' The aggrieved party 'need not establish that he would have obtained the benefit but for the barrier in order to establish standing.' " *Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097, 2105 (1995) quoting *General Contractors v. Jacksonville,* 113 S. Ct. 2297, 2303-04 (1993)) (internal citation omitted, modification in original). Standing is proper even where a program "establishes 'goals' rather than rigid 'quotas.' " *Bras v. California Publ. Utils. Comm'n,* 59 F.3d 869, 875 (9th Cir. 1995), *cert. denied,* 116 S. Ct. 800 (1996); *accord Omnipoint Corp. v. FCC,* 78 F.3d 620, 628 (D.C. Cir. 1996).

most searching examination") (citations omitted); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Adarand*, 115 S. Ct. at 2113 (quoting *Fullilove v. Klutznik*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)). An affirmative action program may be upheld only if it is narrowly tailored to serve a compelling governmental interest. *Id.*

The county argues that its program is intended to benefit African Americans and women by serving, among others, the following goals: (1) redressing present effects of past and current incidents of discrimination and harassment within the department, (2) sending a message that the department respects diversity and that discrimination and harassment will not be tolerated, (3) promoting more effective fire prevention and firefighting by fostering the trust of a diverse public, and (4) serving educational goals by providing children with racially and sexually diverse role models. The district court found that the first interest asserted was compelling. The court relied on (1) "extensive statistical evidence of discrimination" against African Americans and women, (2) evidence that discriminatory behavior and attitudes within volunteer fire departments carried over into the county fire department,[6] and (3) anecdotal evidence of harassment of African American and female members of the

[6] According to the defendants, at one time all volunteer fire departments but one, Chapel Oaks, excluded African Americans from membership. Even though volunteer departments no longer formally exclude African Americans, the County claims that an atmosphere of racial intolerance still pervades many volunteer departments, making African Americans feel unwelcome and less likely to join. In addition, many women have reported that they were sexually harassed while they were members of volunteer departments and that male members of the departments made it known that women were not welcome. African Americans and women were not allowed to ride fire trucks in some volunteer departments, for example, and were subject to hazing and offensive epithets.

county fire department. The plaintiffs challenge these findings, primarily on the grounds that most acts of harassment and discrimination occurred long ago and that there is no present evidence of racial or sexual animus within the Prince George's County fire department. We need not resolve this dispute because even assuming, *arguendo,* that the asserted interests are compelling, the program is not narrowly tailored because the means chosen by the department are not related closely enough to the interests asserted.

The program is not narrowly tailored because means less drastic than outright racial classification were available to department officials. In particular, the Prince George's County Code expressly provides that the fire department may eliminate its volunteer preference in order to encourage diversity within the department. The department did not, however, take that simple step. Indeed, if discriminatory attitudes within the county fire department owe their origin to practices within volunteer fire departments, as the defendants claim, then the most logical solution is to deny volunteer firefighters the hiring preference they currently enjoy. If a governmental body finds itself linked to a private entity that discriminates, the government should sever its ties to the discriminating entity before resorting to reliance on a suspect classification. "[E]xplicit racial preferences, if available at all, must be only a 'last resort' option." *Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207, 217 (4th Cir. 1993); *see also United States v. Paradise,* 480 U.S. 149, 171 (1987) (plurality opinion); *In re Birmingham Reverse Discrimination Employment Litig.,* 20 F.3d 1525, 1546-47 (11th Cir. 1994), *cert. denied,* 115 S. Ct. 1695 (1995).

Another defect in the program is its tendency to benefit particular minority groups that have not been shown to have suffered invidious discrimination. The county claims that past pervasive discrimination against African Americans requires it to maintain its affirmative action program. The current program, however, treats all minority groups alike,

even though the county has presented evidence only of discrimination against African Americans. The department has, for example, passed over white applicants in favor of Hispanics and South Asians, but there is no record evidence of discrimination against Hispanics or South Asians. This failure to match particular racial or ethnic preferences with particular acts of discrimination against particular racial or ethnic groups also shows that the program as currently structured is not narrowly tailored. *J.A. Croson*, 488 U.S. at 506; *accord id.* at 510-11 (O'Connor, J., concurring).[7]

III.

A.

None of the plaintiffs (except for Reedy, whose case we discuss below) ranked high enough on the Applicant Register to have been offered a job even in the absence of the fire department's affirmative action program. Because the existence of the affirmative action program did not cause them to be denied employment opportunity, the plaintiffs (except Reedy) may not be awarded any personal relief. *See St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2752 (1993); *Jiminez v. Mary Washington College*, 57 F.3d 369, 377-78 (4th Cir.), *cert denied*, 116 S. Ct. 380 (1995); *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986) (per curiam).

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[7] We also note that no written fire department document describes the mechanics of the program's operation. Because the program here is unwritten, judicial examination of its provisions is more difficult, lending support to our finding that the program is not narrowly tailored. *Cf. White v. Roughton*, 530 F.2d 750, 754 (7th Cir. 1976) (per curiam) ("[f]air and consistent application of [ ] requirements requires that [ ] [ ] written standards and regulations" be established); *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1140 (D.N.H. 1976) ("the establishment of written, objective, and ascertainable standards is an elementary and intrinsic part of due process").

The plaintiffs argue that their rank on the Applicant Register is suspect due to department officials' discriminatory method of administering and scoring exams and interviews. The district court rejected this claim, as do we. We have conducted a de novo review of the record evidence, and we agree with the district court that the plaintiffs have not forecast sufficient evidence showing "that the Department 'played with the process' to ensure the hiring of minority applicants." Dist. Ct. Op., at 7 [Appendix at p. B-8]. We affirm the denial of personal relief to all the plaintiffs (except Reedy) for the reasons stated in the district court's opinion. *Id.* at 7-9 [Appendix at pp. B-7 through B-8].

B.

Reedy's case is different. He ranked eighth on the Applicant Register in a recruiting season when the department made nine offers. Three of those offers went to affirmative action candidates ranked lower than he. Thus it appears that Reedy would have received an offer of employment in the absence of the affirmative action program and that therefore he should be considered for relief. The defendants claim, however, that Reedy was not offered a job because other applicants refused their offers too close to the beginning of the department's training period for a job offer to have been made to Reedy. The district court should have addressed the factual issue of whether Reedy would have been offered employment in the absence of the department's affirmative action program.[8] We therefore remand Reedy's personal claim to the district court for a new determination of whether he is personally entitled to relief.

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[8] According to the district court, Reedy was not hired because three white males ranked higher than he did. Dist. Ct. Op., at 6 [Appendix at p. B-5]. However, because the program is invalid, this comparison is not relevant; Reedy must be compared to all applicants, regardless of their sex or race.

IV.

The district court also held that the individual defendants were entitled to qualified immunity. We disagree.

Government officials performing discretionary functions are immune from civil liability unless "in the light of pre-existing law the unlawfulness [of their conduct is] apparent." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). The plaintiffs may overcome this qualified immunity only if they can demonstrate that the defendants' conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Thus the question is whether the individual defendants should have known in 1993 and 1994 that the fire department's affirmative action program was unconstitutional.

In 1989 the Supreme Court's decision in *J.A. Croson* (affirming our 1987 decision striking down an affirmative action program, *see* 822 F.2d 1355) should have put all reasonable administrators of local affirmative action programs on notice that their programs would be subject to strict scrutiny. In that case the Supreme Court expressly said that an affirmative action program may not give benefits to minorities in general, but it must target benefits only to particular groups that were the subject of particular acts of discrimination: "The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination" in the particular field and in the particular location "suggests that perhaps the [defendant's] purpose was not in fact to remedy past discrimination." *J.A. Croson,* 488 U.S. at 506. Furthermore, in *Podberesky v. Kirwan,* 956 F.2d 52 (4th Cir. 1992), we reaffirmed the importance of maintaining a close nexus between the remedy and the discrimination the remedy is intended to correct. Fire department officials at least should have re-evaluated the mechanics of and need for their affirmative action program at that time. Also, by the time of the 1994 hiring season, a reasonable official would have been aware of two of our opinions, *Hayes* (1993), *supra,*

and *Maryland Troopers Ass'n, Inc. v. Evans,* 993 F.2d 1072 (4th Cir. 1993), in which we held state affirmative action programs invalid because they were not narrowly tailored to serve compelling state interests. Thus, we believe that the individual defendants have not established their entitlement to qualified immunity because case law (about which a reasonable official would have known) had clearly established by 1993 and 1994 that the department's affirmative action program failed to satisfy the strict requirements of the Equal Protection Clause.

V.

The judgment of the district court is affirmed in part and reversed in part. The case is remanded for fashioning of appropriate injunctive and declaratory relief, for consideration of whether plaintiff Reedy was denied an offer of employment because of his race or sex, and for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARC ALEXANDER, *et al.*, *Plaintiffs,* v. PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*, *Defendants.*	CIVIL NO. AW-93-2636 Consolidated with CIVIL NO. AW-94-2090

MEMORANDUM OPINION

(Filed October 11, 1995)

The Plaintiffs commenced this case by challenging the Prince George's County Fire Department's ("County" or "Department") decision not to hire them as firefighters. They contend that they would have been hired if not for the Department's affirmative action plan (the "Plan"). They maintain that the Plan is unconstitutional and have brought this action under 42 U.S.C. § § 1981 and 1983 seeking damages and injunctive relief.

Presently before the Court is the Defendants' motion for summary judgment. The Plaintiffs have filed a cross-motion for partial summary judgment. The Court has held a hearing in this matter and closely reviewed the memoranda

and exhibits filed by the parties.[1] For the reasons that follow, the Court will grant the Defendants' motion.

I. *Factual Background*

The relevant facts in this case are undisputed. The Plaintiffs are six white males and one white female. Plaintiffs Marc Alexander, Timothy Clark, George Frye, Robert Moore, Angela Moore, and Richard Saxberg applied for firefighter positions with the Department in 1993. The Department hired thirteen individuals in that class of firefighters, but it did not hire any of the Plaintiffs. Mr. Alexander, Mr. Frye, and Ms. Moore applied for firefighter positions again in 1994, however, Mr. Clark, Mr. Moore, and Mr. Saxberg did not. In that same year, Plaintiff Josh Reedy applied to the Department for the first time. The Department hired Mr. Alexander and Ms. Moore in 1994; it did not offer positions to Mr. Frye and Mr. Reedy.

The Plaintiffs have brought this suit against Prince George's County, Maryland. The Second Amended Complaint also names as Defendants M.H. Estepp, William Goddard, III, Maureen Hennessy, and Yvonne Tyler. These individuals are officers of the Department, and the Plaintiffs claims against them are in both their individual and official capacities.

A. *The Hiring Process*

Since 1984, the Department has used the same procedure to hire firefighters. Applicants are first given a written examination. Those applicants that score 60% or higher on the exam are then orally interviewed. Hennessy Dep. I at 43. Applicants are then placed on the Applicant Register based on their combined score on the written exam (60%) and oral

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[1] The docket sheet lists as pending the Defendants' motion for summary judgement filed in August of 1994 (Paper No. 39) and the Plaintiffs' motion to compel filed that same month (Paper No. 51). Counsel indicated that these matters were moot, and the Court denied them as moot at the hearing.

interview (40%). Paper No. 65, Ex. 4—Response to Interrogatory 13.

The Applicant Register is then divided into three categories or bands—Outstanding, Well-Qualified, and Qualified. The band ranges for the 1993 and 1994 applicants were:

Outstanding—95.50-100.00
Well-Qualified—75.00-95.49
Qualified—60.00—74.99

Paper No. 65, Ex. 5—Response to Interrogatory 12. Within each band, applicants are listed in order based on the preference, if any, to which they are entitled to under County law. The preferences are:

1. P. G. Employees seeking promotions
2. disabled veterans
3. volunteer firefighters who are also veterans
4. veterans who are not disabled
5. volunteer firefighters who are not veterans
6. displaced homemakers who are not veterans
7. P.G. County residents
8. all other persons

Applicants within the same band with the same preference are listed in order based on their combined test scores. Paper No. 65, Ex. 4—Response to Interrogatory 13. All applicants within a given band are considered equally qualified for hire. Knapp Dep. at 26.

Selections are made first from the Outstanding band. If that band is exhausted, selections are made from the Well-Qualified band. The Department has never hired a firefighter from the Qualified band. Goddard Aff. I at ¶ 5.

As part of its hiring process, the Department utilizes its Plan. Based on the County's population, the Plan simply provides goals for the hiring of female and minority candidates; it does not mandate the hiring of unqualified persons. Paper 65, Exs. 11 and 12. For example, if there are not enough qualified minority or female candidates, the goals are

lowered appropriately. Goddard Aff. I at ¶ 6. The Plan, then, does not require the hiring of a certain number of females or minorities.

Again, the focus of this suit is the County's hiring in 1993 and 1994. The Department hired thirteen individuals in its 1993 class of firefighters. The 1994 class had seven members (though it wanted to hire eight) including Mr. Alexander and Ms. Moore.

B. *The Individual Plaintiffs*

1. *George Frye*

Mr. Frye's combined score was 77.80. This score placed him in the Well-Qualified band with a preference as a "volunteer firefighter." He was number 26 on the February 1993 Applicant Register. The four white males hired that year each were taken from the Outstanding band. Goddard Aff. I at ¶ 7. Mr. Frye remained at 26 on the June 1994 Applicant Register. The three white males hired that year were from the Outstanding band or were in the Well-Qualified band and had a higher preference than he did. Goddard Aff. II at ¶ 4.

2. *Marc Alexander*

Mr. Alexander's combined score was 94.6, placing him in the Well-Qualified band with a volunteer preference. He was number 14 on the register. Like Mr. Frye, he was not hired in the February 1993 class. Goddard Aff. I at ¶ 9.

A mathematical error in scoring his written exam was later discovered. Accordingly, his June 1994 combined score was 93.4, placing him once again in the Well-Qualified band. He now had the highest preference because of his employment with the County as a paramedic. He was hired in this class of firefighters. Goddard Aff. II at ¶ 5.

3. *Richard Saxberg*

Mr. Saxberg's combined score of 79.09 placed him in the Well-Qualified band. He was approximately number 164 on

the February 1993 register and was not hired. Goddard Aff. at ¶ 9. He was not included in the June 1994 register as he did not maintain his eligibility for hire. Goddard Aff. II at ¶ 6.

4. *Angela Moore*

Ms. Moore's combined score of 83.32 placed her in the Well-Qualified band in 1993. She also had a volunteer preference. However, she was not hired then as the four females in that class had higher scores and preferences. Goddard Aff. I at ¶ 20. Her score remained the same and she was hired in 1994 in accordance with the Department's goals of hiring qualified applicants. Goddard Aff. II at ¶ 7. It should be noted that Ms. Moore challenges the Plan only so far as it applies to race.

5. *Robert Moore*

Mr. Moore's combined score was 73.90. This score placed him in the Qualified band with no preference in 1993. Goddard Aff. I at ¶ 11. As noted above, the Department has never needed to hire anyone from this band. He did not maintain eligibility for the 1994 class. Goddard Aff. II at ¶ 8.

6. *Timothy Clark*

Mr. Clark's combined score was 66.84, placing him in the Qualified band in 1993. He was not included in that class (Goddard Aff. I at ¶ 12) and did not maintain his eligibility for the 1994 class (Goddard Aff. II at ¶ 9).

7. *Josh Reedy*

Mr. Reedy only applied for the Department's 1994 class. His combined score of 81.48 place him in the Well-Qualified band. He was not hired in that class as the three white males hired either were in the outstanding band or had a higher preference than he did. Goddard Aff. II at ¶ 10.

II. *Summary Judgment Principles*

Summary judgment is appropriate when there is no genuine dispute of material fact and when the moving party

is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986) (citations omitted). See also *Bland v. Norfolk and Southern Railroad Co.,* 406 F.2d 863, 866 (4th Cir. 1969).

In determining whether genuine and material factual disputes exist, resolution of which requires trial, the Court has reviewed the parties' respective memoranda and the many exhibits attached thereto, construing all facts, and all reasonable inferences drawn therefrom, in the light most favorable to the Plaintiffs. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Applying these principles to the record in this case, the Court concludes that summary judgment for the Defendants must be granted.

III. *Discussion*

Before addressing the merits of the Plan, the Court must first address several other issues raised by the parties. The Court will address each of these issues in turn.

A. *Plaintiff's Claims of Inappropriate Practices*

The Plaintiffs first contend that the Department "played with the process" to ensure the hiring of minority applicants. Paper No. 67 at 16-18. Specifically, they allege that they were each "harmed by one or more of the following practices:

(a) altering of test scores;

(b) discriminatory application of the time between permitted retests;

(c) alteration of oral interview scores;

(d) discriminatory method of granting volunteer firefighter status;

(e) the discriminatory setting of employment bands; and

(f) the illegal use of race and gender preferences in offering employment."

Second Amended Complaint at ¶ 59 and 69.

The Plaintiffs do not have sufficient evidence to withstand the Defendants' motion for summary judgment on these claims. For example, the Defendants specifically deny altering written test scores. Goddard Aff. I at ¶ 13. All but two of the Plaintiffs conceded that they have no reason to think that their test scores were altered. *See* Saxberg Dep. at 35; R. Moore Dep. at 21-22; Frye Dep. at 23-24; Reedy Dep. at 67; A. Moore Dep. at 21-22. Moreover, Mr. Alexander has not demonstrated any harm from a scoring error that resulted in raising his test score and that wasn't discovered until after the February 1993 class was hired. Alexander Dep. at 16-20; Goddard Aff. I at ¶ 8. Additionally, Mr. Clark has only stated that, after reviewing his exam, "a lot of the answers did not seem like the answers I put on the paper." Clark Dep. at 8. Such speculation is insufficient to withstand the motion for summary judgment. Fed. R. Civ. P. 56(e); *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1129-30 (4th Cir. 1987).

The Plaintiffs also fail to present sufficient evidence in support of their allegations of lowering oral interview scores. Again, most of the Plaintiffs admit that they have no reason to think that the Defendants altered their scores. *See* Saxberg Dep. at 36; R. Moore Dep. at 21-22; Frye Dep. at 24; Reedy Dep. at 67-68; A. Moore Dep. at 21-22; Alexander Dep. at 16. The Plaintiffs rely on irrelevant evidence—the alleged altering of an applicant's score who is not a plaintiff (Paper No. 67 at 17) and speculation—a personal belief that the Department officials were more helpful to minority applicants (Paper No. 67 at 18). Again, such evidence is insufficient. *Felty*, 818 F.2d at 1129-30.

Plaintiff Timothy Clark does allege that his interview score was altered based on a statement from Lt. Brian Larman to Mr. Clark's mother. Lt. Larman allegedly told her that he gave Mr. Clark a 100 and that the other two examiners scored him 100 and 95. Clark Dep. at 6. Lt. Larman denies making such a statement (Larman Dep. at 4-5; 47) and Clark's actual score was 63.61 (Goddard Aff. I at 12). Moreover, taking this alleged statement as true, there is still no evidence that Mr. Clark's score was altered *because* of his race or gender. Furthermore, assuming his oral interview score was 100, he still would not have been selected. Goddard Aff. I at ¶ 12. Therefore, summary judgment on this claim must be for the Defendants.

Finally, there is no evidence to support the Plaintiff's other claims of "playing with the process." There is no evidence that the Defendants denied white males the opportunity to retest or granted volunteer preferences on the basis of race. The Defendants specifically deny having such policies. Goddard Aff. I at ¶ 14, 16. There is also no evidence that the Plaintiffs were harmed by the setting of the employment bands. Accordingly, summary judgment must be for the Defendants on these claims.

B. *Standing*

To pursue this action, the Plaintiffs must first demonstrate that the challenged policy has caused them an actual injury that can be redressed through judicial action. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted). This requirement of standing insures that litigants have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

The Defendants argue that only Plaintiff Reedy has standing to pursue this suit. It is undisputed that only thirteen applicants were hired for 1993, and that only seven were hired in 1994. It is also undisputed that none of the Plaintiffs ranked in the top thirteen on the Applicant Register for 1993. For 1994, Plaintiffs Reedy and Alexander were ranked in the top eight on the Applicant Register, and Alexander was in fact selected. Thus, the Defendants argue that because they would not have been hired even if there was no affirmative action plan, the Plaintiffs other than Reedy lack standing. See, *e.g.*, *Bertoncini v. City of Providence*, 767 F. Supp. 1194, 1197-99 (D.R.I. 1991) (only plaintiffs ranked 60th or higher on eligibility list demonstrated irreparable harm necessary for injunctive relief when only 60 openings available).

The Court is not persuaded by this argument. In cases under the Fourteenth Amendment, "the denial of equal treatment resulting from the imposition of the barrier" is the injury for standing purposes. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 113 S. Ct. 2297, 2303 (1993). *See also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-81 n. 14. The Defendants maintain that this rule does not apply as the Plan only provides preferences, not strict set asides. However, the Court does not read the rule so narrowly. Here, the alleged injury is that the Plan is a "barrier that either created a discriminatory obstacle or had the effect of producing unequal access" to employment with the Department. *Hopwood v. State of Texas*, 861 F. Supp. 551, 569 (W.D. Tex. 1994) (unsuccessful applicants have standing to challenge law school's affirmative action program although it only provided for preferences). Therefore, the Court finds that the Plaintiffs each have standing in this case.

C. *1993 Applicant Register*

The Court will consider the 1993 Applicant Register (Paper No. 65, Ex. 1) despite the Plaintiffs' objections. The Plaintiffs contend that the document, which is simply a list

of the applicants for firefighter positions in 1993, is hearsay. However, the applicant register is continually updated as part of the hiring process. Goddard Aff. III at 5. The Defendants created the 1993 Applicant Register by reinserting the names of those that for one reason or another dropped off the list so that a comprehensive list is available. Thus, it is a business record that would be admissible at trial under Fed. R. Evid. 803(6)(8).

D. *Authority to Adopt the Plan*

The Plaintiffs argue, in part, that the Department did not have authority to adopt the Plan. Without such authority, the Plan cannot stand. *See, e.g., Concrete General v. Wash. Suburban Sanitary Com'n.*, 779 F. Supp. 370 (D. Md. 1991).

The Court finds that the Department had authority to adopt its Plan. It is undisputed that the P.G. County Council required the County Executive to establish an affirmative action plan by executive order. P.G. County Code, §16-109(b) (Paper No. 65, Ex. 9). The County Executive issued an Order pursuant to the Council's instruction, and the Plan continues under this Order (Paper 65, Ex. 11). Finally, "formal findings of discrimination need neither precede nor accompany the adoption of affirmative action." *Ensley Branch, N.A.A.C.P. v. Siebels*, 31 F. 3d 1548, 1565 (11th Cir. 1994) (citations omitted). Accordingly, the Court finds that the Department had authority to adopt the Plan.

E. *Strict Scrutiny*

It is well-settled that classifications based on race must be evaluated under the strict scrutiny standard.[2] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Hayes*

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[2] The Plaintiffs brought this action pursuant to 42 U.S.C. § 1981 and 1983. Because the Court finds that the Plan survives scrutiny under Section 1983, it necessarily survives Section 1981 analysis. *See Stuart v. Roche*, 951 F. 2d 446, 455 (1st Cir. 1991), cert. denied, 504 U.S. 913 (1992).

v. North State Law Enforcement Officers Ass'n., 10 F. 3d 207, 212 (4th Cir. 1993). Under this standard, the classification must be based on a "compelling interest" and the affirmative action plan must be "narrowly tailored." *Hayes*, 10 F. 3d at 212 (citations omitted). The Supreme Court has recently reminded us that application of strict scrutiny should not be considered fatal to affirmative action plans.[3] *Adarand Constructors, Inc. v. Pena*, _____ U.S. _____, 63 U.S.L.W. 4523, 4533 (1995) (citations omitted).

1. *Compelling Interest*—To show a compelling interest, the County must show more than general societal discrimination. *Croson*, 488 U.S. at 498-99. Instead, the County must specify the past discrimination that it is responsible for that it is targeting with its Plan. Id. at 500. Moreover, the County must demonstrate that its past discrimination has present effects. *Podberskey v. Kirwan*, 956 F. 2d 52, 56 (4th Cir. 1992) (citations omitted). Proof of past discrimination generally includes statistical evidence of discrimination and anecdotal evidence. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 338 (1977).

The Defendants have presented extensive statistical evidence of discrimination. The Department first implemented a minority recruitment program in 1974. At that time, out of 290 firefighters, only approximately eight of its firefighters were minorities, and there were no women in the Department. Goddard Aff. I at ¶ 19. The County's labor force was then approximately 41% female and 17% minority. Paper 65, Ex. 10. The County's efforts were largely unsuccessful, and, in June of 1977, only twelve of the firefighters were minorities and there were still no women firefighters. Goddard Aff. I at ¶ 20.

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[3] Gender based classifications are subject to "intermediate scrutiny," *Faulkner v. Jones*, 10 F. 3d 226, 231 (4th Cir. 1993). Under this test, the classification must be "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The Court will address both aspects of the Plan together for convenience.

One of the major obstacles to the recruitment of minorities was the firefighter examination. Firefighters are generally considered entry-level employees. *Peightal v. Metropolitan Dade County*, 815 F. Supp. 1454, 1463 (S.D. Fla. 1993), aff'd, 26 F. 3d 1545 (11th Cir. 1994) (citations omitted). This examination, however, required knowledge gained through experience as a firefighter. The only individuals with such experience were volunteer firefighters, and the volunteer firefighter organizations in the county were almost exclusively white male. Goddard Aff. I at ¶ 21. Therefore, as a result, the Department remained almost solely white male.

In 1980, because of its blatant discrimination, the Office of Revenue Sharing of the Department of the Treasury ("ORS") threatened to cut off funding to the Department if it did not act to alleviate its hiring disparities. Paper No. 68 at Ex. 1. The ORS found that the County's relevant labor force was 40.7% female and 16.5% minority, but that the Department was only 1.4% female and 9.9% minority. The ORS required the Department to provide annual reports regarding its progress in curing this disparity. Goddard Aff. I at ¶ 23.

In 1984, pursuant to Section 16-109 of the County Code, the Department adopted a new plan. The 1980 census reported the County's labor force as 47.4% female and 41.5% minority. Paper No. 65, Ex. 10. However, the Department was only 3% female and 19% minority. The Department, therefore, set its five-year goals at 10% female and 40% minority for firefighters. Goddard Aff. I at ¶ 25.

As part of its plan, the Department used new recruiting strategies. These included recruiting at area colleges, advertising in ethnic newspapers, and employing a full-time minority recruitment officer. Goddard Aff. I at ¶ 26.

These efforts were of limited success. By 1987, the Department was 27% minority but was only 2% female. In 1989, the number of females in the Department increased when the Paramedic trainee and Paramedic I/II classes were transferred from the Department's Technician job category into the Protected Services category that previously was reserved for firefighters. Approximately 40% of the transferred paramedics were women. Paper No. 65, Ex. 14. Consequently, at the end of 1989, the Department was 11% female and 29% minority. Goddard Aff. I at ¶ 28.

By end of the 1993, the Department's Protected Services category was 15% female and 38% minority. The Department's affirmative action goals had not been achieved. Paper No. 65, Ex. 11. The County planned to increase its goals in light of the 1990 census which indicated that the County's labor force was 49.9% female and 57.5% minority. Goddard Aff. I at ¶ 29.

The Plaintiffs first argue that there is no valid statistical evidence of discrimination. They argue that the County is not using the relevant statistics as firefighters are not drawn from the general county population, but instead must have a high school diploma. However, the courts have found that there are no special eligibility requirements for firefighters and have used similar statistical comparisons. *Peightal*, 815 F. Supp. at 1463 (citations omitted). Thus, the Defendants are using the proper statistical comparisons.

In addition, the Plaintiffs argue that in fact the evidence demonstrates that there has been no past discrimination by the Department. The Plaintiffs rely largely on one case for that proposition. *See Allen v. Prince George's County*, 538 F. Supp. 833 (D. Md. 1982), aff'd, 737 F.2d 1299 (4th Cir. 1984) (no showing of discriminatory practice in county's hiring). However, that case specifically does not apply to the County's Fire Department. *Allen*, 538 F. Supp. at 836. The Plaintiffs also place great reliance on testimony of members of the Department who stated that they were not personally aware of discrimination by

the Department. Paper No. 67, Ex. 2 at 59; Ex. 23 at 28-29. These officials, however, cannot speak to the Department's prior history. In addition, simply because they were unaware of the discrimination does not mean it did not exist. Accordingly, the Court finds that the Department's statistical evidence establishes a compelling interest to support the Plan.

The Defendants have also presented anecdotal evidence of discrimination in the volunteer fire companies.[4] These companies have traditionally denied memberships to or otherwise discouraged minority and women applicants. For instance, it was commonly known that blacks were not wanted in the companies. Harrod Dep. at 25-26. Black applicants were sent to the "all black station." Grooms Dep. at 66-69. Also, black volunteers were hazed more severely than their white counterparts. Joy Dep. at 62-63. Finally, the other volunteers routinely referred to blacks as "niggers." Allen Dep. at 63.

In addition, women volunteers were subjected to repeated abuse. One woman was told that she couldn't join because she was not a white male property owner. Hennessy Dep. II at 104-05. Women were encouraged not to join (Henry Dep. at 40); they were often called "slut" and "bitch" (Redding Dep. at 102-03; Allen Dep. at 59); most of the stations did not have separate restrooms or sleeping facilities for women (Hennessy Dep. II at 105-08; Redding Dep. at 105-06); one volunteer reported that a male entered the shower area while she was in the shower (J. Edwards Dep. at 64-65); and one volunteer was tied to a pole and sprayed with

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[4] The Court notes that certain evidence submitted by the Defendants is unpersuasive in this regard. For instance, assuming that diversity alone can serve as a compelling interest, Chief Edwards statements (Edwards Dep. at 33-35) do not show a compelling state interest in this case. *See Hayes v. North State Law Enforcement Officers Ass'n.*, 10 F.3d 207, 213-215 (4th Cir. 1993) (testimony of police chief alone as to merits of diversity in police force not enough to show a compelling interest). Evidence of general societal discrimination (Paper 65, Ex. 16) also does not advance their case. *Croson*, 488 U.S. at 498-99.

shaving cream (Hennessy Dep. II at 107). In short, women "weren't wanted." Redding Dep. at 102; Allen Dep. at 57-58.

These attitudes carried over into the Department itself. For example, blacks were not allowed to drive the trucks as soon as whites. Grooms Dep. at 21; Joy Dep. at 21-22; Jones Dep. at 15-16. Also, other firefighters often referred to them as "nigger." Grooms Dep. at 26-27, 40; Powell Dep. at 23-25. In still another incident, a black firefighter came into work one morning to find on his desk a cross inscribed with "R.I.P." and decorated with a sheet designed like a Klansman's hood. Grooms Dep. at 39-40. Members of the Department found this sort of behavior amusing. Grooms Dep. at 39-40.

Similarly, there were repeated instances of harassment and discrimination against female firefighters. Offensive comments were hardly uncommon (Norton Dep. at 17-21) and the comments sometimes escalated into offensive touching (Norton Dep. at 25). Female firefighters also endured being shown X-rated movies (J. Edwards Dep. at 33) and being told they were there to "sleep their way to the top" (Redding Dep. at 21). Finally, like blacks, women were not allowed to drive fire apparatus. Hennessy Dep. II at 51. In sum, it was well known that females and minorities were not welcome in the Department. Goddard Aff. I at ¶ 21.

Furthermore, although the situation in the Department has greatly improved, there remain lingering effects of the Department's past discrimination. For instance, it is still regarded as a male dominated profession where women are not wanted. J. Edwards Dep. at 67-68. Women are still harassed in the Department. J. Edwards Dep. at 45-46. Also, the Department has still not met its goals for hiring minorities and women. Powell Dep. at 43. Additionally, the "good old boy" network still operates to help prevent the hiring of blacks. Grooms Dep. at 71. Thus, the Court finds that there are present effects of the Department's past discrimination.

The Plaintiffs do not deny that there have been racist and discriminatory actions taken against minorities in the past by the volunteer companies. Instead, they argue that the evidence of discrimination must result from the Department's own hiring policies. They maintain that the actions of the volunteer companies are not attributable to the County. *See Krieger v. Bethesda-Chevy Chase Rescue Squad*, 599 F. Supp. 770 (Md. 1984), aff'd, 792 F. 2d 139 (4th Cir. 1986) (volunteer rescue squads are not state actors).

The disparities within the Department, however, are a natural consequence of the Department's hiring policies. For example, the Department's examination, as recently as 1978, favored those with volunteer experience. Powell Dep. at 10-12; Joy Dep. at 15-17; Harrod Dep. at 24-27; Jones Dep. at 9-10. Moreover, the Department did most of its advertising through word of mouth at the volunteer stations. Goddard Aff. I at 19. Naturally, women and minorities did not learn about job openings under these circumstances. The Department cannot simply attribute these blatant discriminatory policies to the volunteer organizations. *See Ensley Branch N.A.A.C.P. v. Seibles*, 31 F. 3d 1548, 1566-67 (11th Cir. 1994) (discrimination against blacks at entry level naturally led to discrimination against blacks in promotion) (citations omitted). *See also Adickes v. Kress Co.*, 398 U.S. 144, 152 (1970) (state action exists when private individuals act in concert with state officials). Therefore, the Court finds that the Department has shown the necessary compelling interest to support an affirmative action plan.

2. *Narrowly Tailored*—An affirmative action plan must be "narrowly tailored to the achievement of that goal." Croson, 488 U.S. at 505-507. In determining whether a plan is narrowly tailored, the courts have considered several factors: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers to be employed and the percentage of minority groups in the relevant population; (4) availability of waiver

provisions; and (5) the effect of the plan on innocent third parties. *United States v. Paradise*, 480 U.S. 149, 187 (1987); *Hayes*, 10 F. 3d at 216 (citations omitted).

i. *Alternative Remedies*—The Plaintiffs argue that alternative steps can be used instead of the Plan. They contend that simply making an effort to recruit minorities will be effective and eliminating the preference for volunteers can alleviate the effects of past discrimination. In short, they maintain that the Plan is not necessary.

The Court is not persuaded by this argument. The alternative remedies (e.g., changing the written test and intensifying minority recruitment) attempted were not effective in achieving the goals of the Plan. Paper No. 65, Exhibit 14. Finally, the Department may take affirmative steps to remedy past discrimination rather than simply forbidding discrimination in the future. *Adarand Constructors, Inc.*, 63 U.S.L.W. 4523, 4542 (Souter, J., dissenting) (citations omitted).

ii. *Duration*—An affirmative action plan will not pass strict scrutiny if it is of unlimited duration. *Hayes*, 10 F.3d at 216-217; *Maryland Troopers Ass'n., Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir. 1993) (plans "may not take on a life of their own."). The Plaintiffs argue that the Plan suffers from this weakness. They contend that the County will continue the plan as long as the firefighters do not exactly mirror the County wide population.

The Court is not persuaded by this argument. The Plan is limited in duration and is reviewed annually to see if its goals have been achieved. Knapp Dep. at 11-12; 18; 52. Moreover, there is no evidence to support the Plaintiff's argument. Accordingly, the Court finds that the Plan has a limited duration. Fed. R. Civ. P. 56(e).

iii. *Relationship Between Work Force and Population*—The Department's Plan is designed to remedy present racial and gender imbalances resulting from past discrimination. As noted

above, the County may use the general labor force as a comparison in choosing its firefighters. *Pieghtal* [sic], 26 F. 3d at 1553-55 (citations omitted). The Department, of course, should utilize goals that reflect the current population of the County. *Mackin v. City of Boston*, 969 F.2d 1273, 1276-77 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1043 (1993). Thus, the Court finds that the Plan is narrowly tailored in this regard. Paper 65, Ex. No. 14.

iv. *Waiver Provisions*—An important attribute of the Plan is its flexibility. The Plan does not require that Department hire a certain number of minorities. For example, in 1993, the County sought to hire five female applicants. However, when five could not be found in the outstanding or well-qualified bands, it chose to hire only four. Goddard Aff. I at ¶ 6. Accordingly, the Plan does not have the trappings of a quota, and the availability of waivers shows that the Plan is narrowly tailored. *See generally Mackin v. City of Boston*, 969 F.2d at 1278.

v. *Impact on Innocent Third Parties*—The Plan does not have a severe impact on innocent third parties. First, it does not bar hiring, and the Department continues to hire many white males. Paper 65, Exhibit 13—Response No. 8. Denial of a possible employment opportunity is less drastic than terminating an existing employee based on race. *Paradise*, 480 U.S. at 189 (quoting *Wygant*, 476 U.S. at 282-83). Moreover, the Plan only gives a preference, not a guarantee of employment, to well-qualified minorities. *Mackin*, 969 F.2d at 1278 (citations omitted). Finally, as noted above, all individuals within a given band are regarded as equally qualified for hire. Therefore, in light of each of these factors, the Court concludes that the Plan is narrowly tailored.

F. *Claims Against Defendants In Their Individual Capacities.*

The Plaintiffs have also raised claims against Defendants Estepp, Goddard, Hennessy, and Tyler in their individual capacities. Of course, qualified immunity protects government officials "performing discretionary functions. . .

from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations omitted).

Assuming arguendo that the Plan is unconstitutional, the Court finds that these Defendants are entitled to qualified immunity in this case. They acted pursuant to an affirmative action plan as instructed by the County Council and Executive. The Plan can hardly be said to so clearly violate the *Croson* standard that individual liability is warranted. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1985) (citations omitted).

Accordingly, the Defendants' motion will be granted and the Plaintiff's motion will be denied. A separate Order will issue.

10/11/95

Alexander Williams, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARC ALEXANDER, *et al.*, *Plaintiffs,* v. PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*, *Defendants.*	CIVIL NO. AW-93-2636 Consolidated with CIVIL NO. AW-94-2090

ORDER

(Filed October 11, 1995)

In accordance with the Memorandum Opinion, it is this 11th day of October 1995 ORDERED:

1. That the Plaintiffs' Motion for Partial Summary Judgment BE, and the same hereby IS, DENIED; and

2. That the Defendants' Motion for Summary Judgment BE, and the same hereby IS, GRANTED; and

3. That judgment is ENTERED for the Defendants; and

4. That the Clerk of the Court CLOSE this case and mail copies of the Memorandum Opinion and this Order to all counsel of record.

Alexander Williams, Jr.
United States District Court
Judge

CONSTITUTIONAL, STATUTORY AND MISCELLANEOUS PROVISIONS

CONSTITUTIONAL PROVISIONS

United States Constitution, Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at

such Place or Places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Maryland, Article XI-A

Section 1. [T]he charter board, . . . or a majority thereof, shall prepare . . . a charter or form of government for said city or such county. . . . Such charter shall be submitted to the voters of said City or County at the next general or Congressional election . . . and if a majority of the votes . . . shall be in favor of such adoption, the said charter . . . shall become the law of said City or County. . . .

Section 3. Every charter so formed shall provide for an elective legislative body in which shall be vested the lawmaking of [the] County. Such legislative body . . . in any

county shall be known as the County Council of the County. The chief executive officer, if any such charter shall provide for the election of such executive officer . . . shall be known . . . in any County as the President or Chairman of the County Council of the County.

STATUTES—FEDERAL

42 U.S.C. § 1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATUTES AND ORDINANCES—STATE AND COUNTY

Maryland Annotated Code, Art. 25A, Section 5

The following enumerated express powers are granted to and conferred upon any county or counties which hereafter form a charter under the provisions of Article XI-A of the Constitution, that is to say: . . . (A) . . .

(1) To enact local laws for the county, including the power to repeal or amend local laws of the county enacted by the General Assembly upon the matters covered by the express powers in this article. . . .

Prince George's County Code, Section 16-109 (1976)

Section 16-109. Equal employment opportunity

(a) It shall be wrongful and illegal for any appointing authority, supervisor, or the Personnel Officer to take any action pursuant to the provisions of this Subtitle with respect to any employee, any applicant for employment, or any former employee seeking reinstatement, reemployment, or reappointment, where any such action would constitute a discriminatory action, as defined in Section 16-102(a)(18). In furtherance of the foregoing, it shall be the policy of Prince George's County, Maryland, to provide equal opportunity in County employment for all persons and to promote the full realization of said equal employment opportunity through

the development and continued maintenance of an affirmative action program within all departments, agencies, and offices of County government. The aforesaid declaration of policy regarding equal employment opportunity shall apply to all aspects of the personnel system established by this Subtitle, including, but not limited to, the areas of classification, recruitment, promotion, training, compensation, and fringe benefits.

(b) In order to properly effectuate the policies set forth in Subsection (a), above, the County Executive shall, by Executive Order, establish the components of an affirmative action program for the County and assign specific duties and responsibilities, as appropriate, to the Chief Administrative Officer, the Personnel Officer, the Equal Employment Opportunity Officer, appointing authorities, supervisors, and employees, with respect to the development, implementation, monitoring, and evaluation of the various components of said program. The aforesaid Executive Order shall be developed and issued so as to give full force and effect to all applicable rules, regulations, and guidelines authorized and promulgated pursuant to the Equal Employment Opportunity Act of 1972 (Public Law 92-261), and shall address the employment opportunities and needs of physically and mentally handicapped persons as if they were a class of persons protected under the provisions of the foregoing Federal statute.

Prince George's County Code, Section 16-162 (1976, 1981)

Sec. 16-162. Establishment and maintenance of eligibility registers.

(d) Order of Names on Register. . . .

(3) Joint Promotion/Recruitment Registers. The Personnel Officer shall first arrange the names of all eligibles on any joint promotion/recruitment eligibility register, whether

continuous or temporary, in descending order with the name or names of the eligible or eligibles assigned the highest rating placed at the top of any such register. Then, the final order of the names of all eligibles on such register shall be determined in accordance with the following procedures:

(A) Where the eligibles on any such register have been assigned numerical or ordinal ratings, the range of the ratings on such register shall be divided into three (3) separate subranges, as appropriate, based on the nature of the range of ratings. The Personnel Officer shall then arrange the names of all eligibles within each such subrange into the following priority categories:

(i) All eligibles who are seeking promotion, if any, shall be ordered, by rating, above all other eligibles identified in subparagraphs (ii), (iii), (iv), (v), (vi), (vii), and (viii), below;

(ii) All disabled veteran eligibles who are seeking initial appointment, if any, shall be ordered, by rating, above all other eligibles identified in subparagraphs (iii), (iv), (v), (vi), (vii), and (viii), below;

(iii) All nondisabled veteran eligibles who have formerly served as volunteer firefighters and are seeking initial appointment as a full-time career firefighter, emergency medical technician, or paramedic, if any, shall be ordered, by rating, above all other eligibles identified in subparagraphs (iv), (v), (vi), (vii), and (viii), below;

(iv) All other nondisabled veteran eligibles who are seeking initial appointment, if any, shall be ordered, by rating, above all other eligibles identified in subparagraphs (v), (vi), (vii), and (viii), below;

(v) All other nonveteran eligibles who have formerly served as volunteer firefighters and are seeking initial appointment as a full-time career firefighter, emergency medical technician, or paramedic, if any, shall be ordered, by rating, above all other eligibles identified in subparagraphs (vi), (vii), and (viii), below;

(vi) All other nonveteran eligibles, if any, who are "displaced homemakers" shall be ordered, by rating, above all other eligibles identified in subparagraphs (vii) and (viii), below;

(vii) All other nonveteran eligibles who are seeking initial appointment and who have certified on their examination applications that they are currently residing within Prince George's County, if any, shall be ordered, by rating, above all other eligibles identified in subparagraph (viii), below, and,

(viii) All other nonveteran eligibles who are seeking initial appointment and who have certified on their examination applications that they are not currently residing within Prince George's County, if any, shall be ordered, by rating, in the last priority category; . . .

(4) Suspension of Volunteer Firefighter Preference Rankings. Whenever the Personnel Officer determines that the ranking of eligibles for appointment to a vacant position as a full-time career firefighter, emergency medical technician, or paramedic will have a disparate effect on a protected class as defined by the guidelines of the Equal Employment Opportunity Commission, upon written certification to the County Executive and the Fire Chief, he shall rank eligibles without regard to the preference for prior service as a volunteer firefighter.

MISCELLANEOUS

Charter of Prince George's County, Maryland, Art. V

Section 501. Supervision and Control.

Except as otherwise provided in this Charter or in State law, all agencies of the County government shall be subject to the direction, supervision, and control of the County Executive.

Section 502. Structure.

All functions and duties of the executive branch shall be allocated among and within such agencies as may be established by law.

Section 503. Reorganization.

The County Executive may propose changes in the organization of the executive branch, including the establishment or abolition of agencies, and in the assignment of functions, powers, and duties among agencies. Reorganization proposals shall be set forth in executive orders in statutory form and be submitted to the Council. Such executive order shall become effective and have the force of law sixty calendar days after submission unless disapproved by majority vote of the full Council.

The Prince George's County Government,
Order of County Executive No. 15-1983, April 6, 1983

WHEREAS, it is the policy of Prince George's County to provide equal opportunity to all of its employees and applicants for employment in matters of hiring, promotion, transfer, training, compensation, benefits and all other terms, privileges and conditions of employment, without regard to race, sex, color, religion, creed, national origin, political opinion, marital status, age, physical or mental handicap, or physical appearance; and

WHEREAS, the implementation of this policy will require special affirmative action to assure equal opportunities for all, it is also the County's policy both to take affirmative steps to seek out employees at any level whose potential has not been fully utilized, with the objectives of assisting them in reaching full potential and to utilize the resources and promise of the community whenever it is necessary to fill an opening from outside the existing work force; and

WHEREAS, Equal Employment Opportunity is the law, mandated by federal, state, and local legislation, presidential Executive Orders and definitive court decisions; and

WHEREAS, a successful affirmative action program not only benefits those who have been denied equal employment opportunity but also provides positive benefits to the County through fuller utilization and development of the untapped human resources and skills of minority groups and women.

NOW THEREFORE, BE IT ORDERED, that by the power vested in me by Article V, Sections 501, 502, and 503 of the Charter of Prince George's County, Maryland:

1. The Chief Administrative Officer is designated as the Affirmative Action Officer for Prince George's County and will be responsible for ensuring compliance with the letter and spirit of the aforementioned policy.

2. The Personnel Officer will be responsible for the programmatic development, coordination, implementation and monitoring of this program. Periodic reports shall be prepared for the Chief Administrative Officer.

3. Each department/agency head shall be responsible for the application of said Equal Employment and Affirmative Action policies and shall beheld accountable for attainment of stated Affirmative Action goals.

4. Department/agency heads shall be held responsible for ensuring that all personnel understand and carry out the Equal Employment and Affirmative Action policies.

5. All allegations of discrimination instituted against Prince George's County, pursuant to Section 16-203(g) of the County Code, 1975 Edition, as amended, shall be filed with the Personnel Board.

This order rescinds Executive Order No. 60-1979 in its entirety.

Parris N. Glendening
County Executive